

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

C.P.(IB)-443(MB)/2018

Under section 9 of the IBC, 2016

In the matter of

Nandlal Girdhar Popat

....Petitioner/
Operational Creditor

v/s.

**Samadhan Marketing &
Merchandise Pvt. Ltd.**

....Respondent/
Corporate Debtor

Heard on 15.01.2019

Order delivered on 11.02.2019

Coram: Hon'ble Shri. M.K. Shrawat, Member (Judicial)

For the Petitioner : 1. Dr. S.K. Jain, PCS
2. Mr. Yahya Batatawala, Adv.

For the Respondent : 1. Ms. Prachi Wazalwar, Adv.
2. Mr. Navneet Rao, Adv.

Per M.K. Shrawat, Member (Judicial)

ORDER

It is a Company Petition filed on 22.03.2018 by an individual Mr. Nandlal Girdhar Popat residing at Jatpura, Chandrapur Tah. & Dist., Chandrapur, Maharashtra, as **Operational Creditor, u/s 9 of the Insolvency and Bankruptcy Code, 2016** against the **Corporate Debtor** viz. Samadhan Marketing and Merchandise Pvt. Ltd., having its Regd. Office at 'Nand Niwas', Near Jatpura Gate, City Bazar Complex, Chandrapur, Maharashtra for a claimed '**Operational Debt**' of **₹2,81,250/-**. Since the Corporate Debtor is defaulted in making monthly payment by honouring post dated chques since 06.10.2017, the Petitioner sent a demand notice on 22.02.2018 u/s 8 of IBC to the Corporate Debtor. However, the Corporate Debtor failed to make payment of the said debt amount, hence, the Petitioner has filed this Petition to initiate Corporate

Insolvency Resolution Process (CIRP) against the Corporate Debtor on the ground that this Corporate Debtor failed to pay the **total outstanding debt of ₹2,81,250/-**.

2. The Petitioner has submitted Form-5 along with the relevant documents such as computation of claim, Bank Account statements, Bank Certificate issued by Punjab National Bank, Lease Deed dated 13.10.2016 between the Petitioner & ors. and the Corporate Debtor, and consent letter from the proposed Interim Resolution Professional.

Brief Facts of the Case:

3. The Petitioner states that the Corporate Debtor entered into a Lease Deed with the Operational Creditor on 13.10.2016. As per the Lease Deed, the Corporate Debtor issued some Post Dated Cheques payable on each months towards the **compensation payable** to the Operational Creditor. On presentation of the cheques dated 05.10.2017, 05.11.2017, 05.12.2017, 05.01.2018 and 05.02.2018 as agreed in the Lease Deed, those cheques were returned as dishonoured under the remark as "Account Closed". Therefore, the Operational Creditor sent a demand notice on 22.02.2018 to the Corporate Debtor u/s 8 of IBC for which the Corporate Debtor through a disqualified director replied by email on 05.03.2018 stated to be raising some false and frivolous contentions. The Corporate Debtor again sent one more reply on 06.03.2018 through the same director wherein the Corporate Debtor stated that a dispute is in existence and not liable to pay the debt amount.

4. The Petitioner has given the workings of the defaulted amount as under:

Cheque No.	Date	Due Amount Rs.
614186	05.10.2017	56,250.00
614193	05.11.2017	56,250.00
614200	05.12.2017	56,250.00

614207	05.01.2018	56,250.00
614214	05.02.2018	56,250.00
Balance Due		2,81,250.00

5. The Petition is supported with the duly registered 'Lease Deed' dated 13.10.2016, which is the base document for the transaction. As per the said Deed, the Petitioner herein along with his other family members viz. (i)Mrs. Heena Dayalal Popat, (ii)Mrs. Hansa Nandlal Popat, (iii)Mr. Dayalal Girdhar Popat, (iv)Mr. Nandlal Girdhar Popat, (v)Mr. Dayalal Girdhar Popat (HUF), (vi)Mr. Ghanshyam Nandlal Popat (HUF), (vii)Mr. Karthik Nandlal Popat (HUF), **leased their property at 'Nand Niwas', Chandrapur, to M/s. Samadhan Marketing and Merchandise Pvt. Ltd. for an agreed amount of rent of Rs. 1,25,000/- per month payable to the Lessors/owners as below:-**

#	Name	Amount (Rs.)
1.	Mr. Heena Dayalal Popat	45,114.00
2.	Mrs. Hansa Nandlal Popat	28,232.00
3.	Hanshyam Nandlal Popat	3,795.00
4.	Karthik Nandlal Popat	3,795.00
5.	Dayalal Girdhar Popat (HUF)	44,064.00
Total		1,25,000.00

6. In addition, the Lessee shall pay interest-free Security of Rs. 7,50,000/- along with other terms and conditions. One important condition in the Lease Agreement was that the leased premises must be vacated by Lessee latest by 31.12.2018 as the Lessors want the premises to be used for their own business activities.

7. Moreover, there was a special condition in the Deed as below:

"10. Compensation to Lessors Nos. 3&4:

Shri Nandlal Popat and Shri Dayalal Popat were active directors of the Lessee Company i.e. Samadhan Marketing and Merchandised Pvt. Ltd. who have now ceased to be

Directors as a condition for this lease deed. Considering their services rendered to the company and their gracious acceptance to continue the lease for further terms as mentioned above, the Lessee shall pay an amount of Rs. 62,500/- per month each to Shri Nandlal Popat and Dayalal Popat by way of compensation for the period starting from 01.04.2015 till vacation of premises by the Lessee or 31.12.2018, whichever event last occurs.”

7.1 The reason for reproduction of the above para is to distinguish the terms of the Lease Deed being different in respect of the owners of the property from the payment terms agreed upon in respect of agreeing parties consenting the terms of the Lease Deed.

8. In furtherance to the Lease Agreement, the Lessee given PDCs to the Lessors i.e. for monthly rent as well as the compensation to the ex-directors of the Lessee company – the Corporate Debtor herein. However, since October 2017 the cheque presented in the bank by the Petitioner bounced with remark 'Account Closed'. Ld. Counsel of the Petitioner has therefore concluded that there was undisputed debt of outstanding rent which was an admitted liability because of the issuance of cheques which were dishonoured, hence this Petition deserves admission.

Submissions by the Corporate Debtor:

9. The Corporate Debtor has filed its written submissions wherein it is alleged that the Lessors failed to fulfil their primary responsibilities of proper maintenance of the premises, which led to the **stop payment** of PDCs given to the Lessee including that of the compensation to two ex-directors, one of whom is the Petitioner herein. The Corporate Debtor further stated that prior to the Lease Deed, the Petitioner & others and the Respondent had entered into a Memorandum of Understanding (MoU), however, no copy provided by the Respondent. The Corporate Debtor further stated that the Petitioner and others (Lessor) have failed to fulfil their obligations and representations in terms of the said Lease Deed and

therefore, the Respondent was left with no option but to seek legal remedy against the Petitioner and others. Therefore, filed a Civil Suit titled R.C.S. No. 98 of 2017 before the Hon'ble Civil Judge Junior Division – 9 Court, Chandrapur on 02.05.2017, copy of which is annexed to the written submission.

10. The Corporate Debtor further states that as a consequence of the above Civil Suit, the Ld. Judge while considering interim application, mentioned that the plaintiff (i.e. Respondent/Corporate Debtor herein) always has the remedy to instruct the bank to stop payment of cheques. Accordingly, the alleged payments to the Petitioner were withheld for want of performance of obligations in terms of said Lease Deed by them. However, nothing mentioned about any order by the said Court with respect to the same point.

11. The Corporate Debtor stated that in view of the above, it is clear that there is an '**existence of dispute**' well before receipt of the demand notice on 22.02.2018 from the Petitioner, which is informed through reply dated 06.03.2018. The Corporate Debtor argued that since a dispute is in existence before the demand notice, Petition u/s 9 of the IBC, should be dismissed. It further relied on a judgment by the Hon'ble Supreme Court in "**Mobilex Innovations Private Limited v. Kirusa Software Private Limited**" dated 21.09.2017 wherein the apex Court has held that what is important is the existence of dispute and/or the suit or arbitration proceeding must be 'pre-existing' i.e. it must exist before the receipt of demand notice.

Findings:

12. Both the sides have been heard at length. Case record is perused carefully along with the evidences as well as the case laws referred. Certain facts as discussed above are not in dispute and summarised hereinbelow with the purpose of addressing the claim and counter claim of both the sides.

13. The Corporate Debtor is a company running departmental stores in the rented premises of the Petitioner and his family members. The Petitioner was one of the directors of the Debtor Company earlier but due to some dispute he resigned along with his other family member who was also a director in the Debtor Company. Thereafter, the ex-directors who are the landlord of the premises demanded the Corporate Debtor to vacate but as the Corporate Debtor was in urgent need of the same place to run the business, earnestly requested the landlord/ex-directors to extend their agreement. As a result, they agreed to extend the Lease Deed up to 31.12.2018 with a monthly rent of Rs. 1,25,000/- p.m. together with a interest-free security of Rs 7,50,000/-. The monthly rent was payable to the other family members of the Petitioner. Further, the Petitioner and his one other family member, who have resigned from the Corporate Debtor, was offered a compensation of Rs. 62,500/- p.m. each for the services rendered in the past to the company. At this juncture, it is worth to clarify that the arrangement with the Petitioner as ex-director was not in the capacity of the owner of the property in question but it was a compensation for the services of the Petitioner. It is also clarified that no separate agreement deed was executed but the condition of payment of compensation has also been incorporated in that very 'Lease Deed'.

14. The Petitioner may or may not be landlord but the amount payable to him is not titled as 'rent' whereas it is a compensation payable to him for the services rendered to the company in the past, which falls within the category of '**Royalty**' payment. It has nothing to do the rent payment.

15. The Corporate Debtor alleged that the company incurred heavy loss due to a fire in the building, which damaged the premises as well as goods kept in the premises. The Corporate Debtor further alleged that the Petitioner being the landlord was not doing any maintenance as the same is required to run the business in the damaged premises. Since no service forthcoming from the landlords, it filed a civil suit against the landlords including the

Petitioner herein. The Corporate Debtor states that the Ld. Judge directed the Corporate Debtor to stop payment of the PDCs given to the landlord and accordingly the Corporate Debtor stopped payment of PDCs. On this issue a decision of respected NCLAT is worth citation of "**Shah Brothers Ispat Pvt. Ltd. v. P. Mohanraj & Ors.**" [Company Appeal (AT) (Insolvency) dated 31.07.2018]. In that case there was a Complaint u/s 138 of the Negotiable Instrument Act, 1881. In the order, the Hon'ble Judge held that no criminal proceeding is covered under Section 14 of IBC and could be proceeded u/s 138 of Negotiable Instrument Act even during the period of moratorium.

16. At this juncture, it is also worth to take cognizance of the distinction between the facts of this case with the facts of certain precedents pronounced on the issue of pre-existence of dispute. Although in this case a civil suit was filed on 02.05.2017 by the Corporate Debtor/Respondent, but it was against the Landlords of the premises for maintenance of property. That suite has nothing to do with the compensation/royalty payment to the Petitioner. For argument sake, as on date when the Notice u/s 8 was issued on 22.02.2018, there was no existence of dispute alleged to have been raised through the said Civil Suit. On the issue of pre-existence of dispute the Hon'ble Supreme Court in the case of "**Mobilox Innovations Private Limited v. Kirusa Software Private Limited**" dated 21.09.2017 has said that the existence of dispute disqualifies admission of a Petition, but this case law is not going to help the Respondent Debtor because of the basic distinction that the claim in question falls within the definition of Section 3 (6) defining the term 'Claim' means right to remedy for breach of contract. Hence, nothing but an Operational Debt.

17. However, this Bench thoroughly perused the Civil Suit dated 02.05.2017 filed by the Corporate Debtor wherein the prayer is reproduced below:

"a) By a decree of permanent prohibitory injunction the defendant may be restrain from the recovering the rent and from depositing the cheques for encashment to recover the rent

from the plaintiff till they carry out repairs, they provide the uninterrupted water supply and till they allow to approach the terrace for the periodical maintenance and repair of cooling system.

- b) The Defendants and all the person claiming them may kindly be restrain from injunction from getting the premises vacated by giving effect to the term of period of lease in lease dated 13.10.2016.*
- c) By decree of mandatory injunction the defendants may be directed to immediately provide uninterrupted water supply to plaintiff shop and cooling system, to carry out the repairs to stop all leakages and seepages from roof and walls of the tenanted premises and to carry out all the repairs of walls, slab and projection which is damage from fire.*
- d) The cost of the suit may kindly be saddle on the defendants.*
- e) Grant any other relief which this Hon'ble Court deems fit and proper in the facts and circumstances of the case."*

18. It is evident from the above that the Respondent Debtor has filed a Civil Suit on 02.05.2019 but it has no correlation to the claim amount of the Petitioner as the same is totally different from the Rent amount. The Bench observed that the Petitioner has not claimed anything related to balance rent amount and hence, the dispute on rent will not apply to the payment of 'Royalty', which is demanded through the Demand Notice dated 22.02.2018. Therefore, it is clear that there is **no existence of dispute** vis-à-vis amount claimed as **Royalty** payment.

19. On perusal of the documents placed and the reasons given above, this Bench being satisfied that the Respondent Debtor company defaulted in paying its debt to the Petitioner, hereby 'Admit' this Petition by imposing 'Moratorium' as follows:-

- I (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(SARFAESI Act);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(II) That supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(III) That the provisions of sub-section (1) Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(IV) That the order of moratorium shall have effect from 00.01.2019 till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

(V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

20. Accordingly, this **CP(IB)-443/2018** is hereby **admitted**.

21. The Petitioner has submitted the consent of the IRP viz. Mr. Manoj Jain, 11, Friend's Union Premises Co-operative Society Ltd, 2nd Floor, 227, P. D'Mello Road, Mumbai – 400 001. email: manojj2102@gmail.com, Registration No.: IBBI/IPA-001/IP-00535/2017-2018/10960. His appointment is confirmed as Interim Resolution Professional to carry-out the functions as mentioned under Insolvency & Bankruptcy Code.

22. The Registry is hereby directed to communicate this order to the concerned parties. The appointed IRP shall submit the Progress Report on or before next date of hearing, now listed for hearing on **25.03.2019**.

Sd/-

M.K. SHRAWAT
MEMBER(JUDICIAL)

Date: 11.02.2019
pvs